JD–64–12
Richmond, VA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KROGER LIMITED PARTNERSHIP I
MID-ATLANTIC

and Case 5-CA-79268

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 400 (UFCW)

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for the General Counsel.
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Roanoke, Virginia,
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for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Richmond, Virginia, on October 1 and 2, 2012. The United Food and Commercial Workers, Local 400, UFCW (the Union) filed the original charge on April 19, 2012, and an amended charge on June 28, 2012. The Regional Director of Region 5 of the National Labor Relations Board (the Board) issued the complaint on July 17, 2012. The complaint alleges that Kroger Limited Partnership I Mid-Atlantic (the Respondent or Kroger) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to bargain collectively with the Union over the development and implementation of a pilot program for employee scheduling. The Respondent filed a timely answer in which it denied that it had violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the retail sale of grocery and pharmaceutical products at facilities in Richmond, Virginia, where it annually derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

The Respondent operates Kroger grocery stores in the company's mid-Atlantic marketing area. The Union represents employees in four bargaining units at those stores. Among the represented employees are those in the Richmond/Tidewater bargaining unit, which covers approximately 25 to 30 stores in Eastern Virginia.[1] In the early spring of 2010, the Respondent and the Union began negotiations for a successor to the collective bargaining agreement for the Richmond/Tidewater employees, which was set to expire on March 27, 2010. By August 2010, the negotiators had agreed to terms for a new agreement and the bargaining unit ratified those terms in September or October 2010. Agents of the Respondent have since signed the 2010 collective bargaining agreement, but the Union's agents have declined to return a signed copy of that agreement to the Respondent. Nevertheless, the Respondent and the Union agree that they are bound by the terms in the 2010 agreement.

During contract negotiations in 2010, the parties reached a side agreement that they memorialized in a letter of understanding dated August 19, 2010. The agreement concerned the development of a three-store pilot scheduling program, referred to by the parties as "select-a-sked" (SAS), under which employee availability would play a greater part in the scheduling of employees' work hours. The existing "preferential" scheduling system assigned schedules based strictly on seniority. The letter of understanding stated:

> The parties agree to test a "Select-A-Sked" pilot beginning on or about February 1, 2011. The pilot will include stores 503, 515, and 533. This pilot will be developed, evaluated, and/or revised by mutual agreement every ninety (90) days by both parties. Should either party believe the pilot is not acceptable it may be eliminated by thirty (30) days written notice to the other party. If both parties agree the pilot is acceptable, then it may be rolled out to the remaining stores

[1] The bargaining unit includes: All employees; except Store Management, Professional Pharmacy Department Employees, Pharmacy Technicians, Store Department Heads, Wine Specialists, Security Employees, Demonstrators, and all clerical employees in the stores of the Employer operated in Eastern Virginia.

> covered by the agreement. If pilot is discontinued, it is acknowledged that the parties shall meet and confer to develop an alternative so that part time hours are equitably distributed.[2]

Thomas McNutt, the president of the Union, was the Union's lead negotiator and the driving force behind the effort to switch to a SAS system. According to one union official, the impetus for seeking this change was a desire to allow as many employees as possible to work enough hours to qualify for medical coverage. The Respondent's officials were amenable to the development of the SAS pilot, but were concerned that employees would try to manipulate such a system to avoid working during the hours when the store was busiest and the work the most demanding.

Mark Federici, the Union's secretary-treasurer,[3] was the official designated to work with the Respondent to develop the SAS pilot, and Terry Dixon, a union regional coordinator, was selected to assist Federici in this effort. Jessica Miles, the assistant human resources manager for the Respondent's mid-Atlantic division, was the management official who had primary responsibility for working with the Union to develop the SAS pilot. The record shows that very little progress was made on SAS between the time the collective bargaining agreement was ratified and February 1, 2011, when the side agreement called for the SAS pilot to be implemented. The record does not show that one side or the other was more responsible for this lack of progress. During the period prior to February 1, the Respondent and the Union had no face-to-face meetings regarding the pilot. Federici and Miles did, however, communicate about creating an SAS committee consisting of district managers and rank-and-file bargaining unit members. In addition, Miles informed Federici that she would be visiting Kroger-owned operations in Arizona and Colorado – Fry's stores and King Soopers stores – that were using a scheduling system that she hoped could serve as a model for the Richmond/Tidewater SAS pilot. From December 6 to 10, 2010, Miles visited a number of the stores that were using the scheduling system and also talked to administrators in the related divisional offices about their experience with it. Miles provided Federici with a document that set forth "guidelines" for the Fry's scheduling program. This 2-page document was not prepared to communicate what Miles had learned during his visit to Arizona and Colorado, but rather was a pre-existing Fry's document that was prepared in 2009, prior to creation of the letter of understanding regarding SAS. This is the only document that Miles provided to the Union regarding either the Fry's or King Soopers scheduling programs.

Prior to the date that the written agreement called for the pilot to be implemented (February 1, 2011), the Respondent and the Union did not reach any agreement to delay implementation, but that implementation date came and went without the pilot being implemented and without grievances, unfair labor practices charges, or information requests

[2] An earlier draft of the letter of understanding, dated May 13, 2010, stated that the parties would implement a pilot "to maximize part time employee work hours." The later, August 19, version revised the language in a number of ways, including by removing reference to maximizing part time employee work hours. The parties agree that the August 19 version of the letter, not the May 13 version, is the one in effect between the parties.

[3] Secretary-treasurer is the second highest position in the Union's hierarchy, ranking below only that of the Union president, McNutt.

regarding SAS being used by either party. Neither side presented a proposed design for the SAS pilot, made any written demands to move the process forward, or proposed dates for the SAS committee to meet. A February 15, 2011, email exchange between Miles and other officials of the Respondent indicated that those officials had agreed among themselves to introduce the SAS pilot on dates between May 3 and May 12, 2011, but the Union was not informed about those plans.

B. PARTIES' DISCUSSIONS REGARDING SAS PILOT PROGRAM

1. Charlottesville Meeting

In March 2011, the parties had their first face-to-face meeting regarding development and implementation of the SAS pilot. This meeting was held in Charlottesville, Virginia, at the Boar's Head resort. The Respondent was represented at the meeting by George Anderson (director of human resources for Kroger's mid-Atlantic division) and Miles, who reported to Anderson. Federici was the only individual present for the Union. Federici, asked where things stood regarding the SAS pilot, and Miles responded that the Respondent was gathering information and was not ready to move forward. Miles discussed her visit to Fry's and King Scoopers. Miles said that the Fry's system that she had been looking to as a possible model for the SAS pilot was not working properly, would soon be discontinued from use at Fry's, and was not a workable option for the Richmond/Tidewater pilot. She did not identify the respects in which the Fry's scheduling system was not working. Miles and Federici agreed that they should move carefully – in the words of Federici to "measure twice and cut once" – so as not to adopt something that was already failing elsewhere. This much of Federici's account was essentially uncontradicted by other testimony and evidence, and I credit it.

There is substantial disagreement about what else was said at the Charlottesville meeting. According to Miles, she informed Federici that she had "received word" that the Respondent planned to introduce a new electronic scheduling tool – later identified as Enterprise Labor Scheduling Solutions (ELSS) – for nationwide use by the Kroger enterprise. Miles' testified that she expressed reservations about putting an SAS pilot into effect only to find that the Respondent had to terminate, or substantially re-work, that pilot 6 months later as a result of the introduction of ELSS. According to Miles' testimony, Federici responded that he had no objection to delaying action on the SAS pilot while ELSS was being readied since the bargaining unit members were happy with the current scheduling system and were in no hurry to see the SAS pilot implemented. In Miles' account, Federici said "Let's keeping kicking this can down the road." Miles testified that she told Federici that she would be finding out more about ELSS in May 2011, and would communicate with him about it at that time. This version of events was corroborated in significant respects by Anderson's testimony.

Federici, on the other hand, testified that at the Charlottesville meeting he never used the term "kick the can down the road" or otherwise indicated that the Union consented to postponing development of the SAS pilot while ELSS was being readied. In addition, Federici denied that either Miles or Anderson told him about plans for wide scale implementation of ELSS or any other new scheduling tool. According to Federici, the Respondent did not tell him about that until a year later during March 2012 discussions in Cincinnati, Ohio.

After carefully considering the record, I do not find an adequate basis for crediting one account over the other regarding disputed aspects of the March 2011 meeting in Charlottesville. There were no neutral witnesses to what transpired. Only Miles, Anderson, and Federici were present and each of them testified consistently with the litigation position of the party with whom they are aligned. None of these individuals memorialized what was said in contemporaneous correspondence or meeting notes, and there was no other documentary evidence that meaningfully supported a particular witness. The absence of such documentary evidence not only eliminates a possible source of corroboration for the accounts of all the witnesses, but also undercuts the accounts of Miles and Anderson to some degree since I would expect the Respondent to create written confirmation of the Union's consent to an indefinite delay of the SAS pilot that McNutt had sought, and obtained, during contract negotiations.

On the other hand, Federici's account is to some extent called into question by the Union's failure, in the months following the Charlottesville meeting, to take any action to urge the Respondent forward regarding the pilot program's development. The record indicates that the parties' understanding was that the Respondent was looking into models for the SAS pilot, but by the time of the Charlottesville meeting, the February 1 implementation date had passed and the Respondent had still not presented an SAS plan, or even the bare bones of a plan. When asked where things stood, Miles gave no specifics on steps that the Respondent would be taking within a definite timeframe, but responded that the Respondent was not ready to move forward and was still gathering information. If Federici remained committed to moving the SAS pilot forward without undue delay, he could have demonstrated that by, for example, writing to the Respondent to demand certain actions, requesting specific information regarding the pilot, proposing dates to convene the SAS committee, proposing the Union's own design for the pilot program, or invoking the grievance or Board processes. The fact that the Union did none of those things in the months following the Charlottesville meeting undercuts to some extent Federici's claim that he did not consent to delay implementation of the SAS pilot.

My assessment of the witnesses' demeanor does not provide a basis for crediting one account over the other. Miles, Anderson, and Federici all gave the impression of being reasonably certain of their respective recollections of the Charlottesville meeting and none of them were particularly evasive or defensive while testifying about it. For the reasons discussed above, I find that, with respect to the disputed aspects of the Charlottesville meeting, neither side's account was shown to be more credible than the other's and thus I make no finding regarding those disputed aspects. I do, as discussed above, credit certain uncontradicted testimony regarding that meeting.

2. Roanoke Meeting

The next time that the Respondent and the Union discussed the SAS pilot was in March or April 2011, in Roanoke, Virginia, at Shaker's Restaurant. Once again, Miles and Anderson were present. The only union representative present was Dixon, the regional coordinator who was assisting Federici regarding the SAS pilot.

Miles and Anderson testified about the Roanoke meeting, but Dixon was not called as witness. Miles testified that Dixon asked her about the Respondent's progress regarding the SAS pilot. Miles responded that she was going to have a meeting with the "general office on an alternate type of – we didn't know what that meeting was going to be about." According to Miles, Dixon went on to say that he did not "know why we need something like" the SAS pilot given that "we don't have a problem with scheduling" and "things are working just fine."

Anderson offered a slightly different account of the meeting. Anderson testified that he, not Dixon, was the one who brought up the SAS pilot. Anderson says that he told Dixon that Kroger "had something in mind" that could possibly be used instead of the SAS program. According to Anderson, he told Dixon "it may not be worth our while [for] the two of us [to] put something together when there was something coming down the pike that could either potentially replace it or could be modified as a – as something similar to Select-A-Sked." Anderson corroborated Miles' testimony that Dixon stated that he was not interested in the SAS pilot because the employees were satisfied with the existing scheduling system.

In the absence of contrary evidence from Dixon or some other source, I credit the testimony of Anderson regarding what was communicated to, and by, Dixon at the Roanoke meeting. That testimony was not internally inconsistent or undermined in any meaningful way on cross examination. Anderson's testimony was corroborated in significant respects by Miles' testimony, but was more specific and confident, and in my view more reliable, than Miles' account.

3. Charleston Meeting

On May 19, 2011, the Respondent briefed Miles about ELSS, but Miles did not share what she learned at that briefing with the Union. Miles and Anderson both credibly testified that the information they received indicated that the ELSS scheduling tool was flexible enough to permit the incorporation or accommodation of an SAS pilot.

As of September 2011, the Respondent had not generated a proposed SAS pilot, and the Union had not generated its own proposal, filed requests for specific information on the subject, made any demands for further action, proposed dates for an SAS committee meeting, or filed a grievance or unfair labor practices charge on the subject. In September, during a meeting at a Marriott hotel in Charleston, West Virginia, the Respondent and the Union had their next face-to-face discussion regarding the SAS pilot. This meeting was convened to negotiate contracts for West Virginia stores, not for purposes of discussing the SAS pilot for the mid-Atlantic division. Nevertheless, during breaks in the formal meeting Miles and Federici discussed the SAS pilot. Walter Christian "Chris" Sauter, a collective bargaining director with the Union, was in the room during these discussions but did not actively participate or, is seems, attend to what was being said.

In Charleston, Federici asked Miles what was happening regarding the SAS pilot. According to Federici's testimony, Miles responded almost precisely as she had every time he had raised the subject since March 2011 – i.e., that the Respondent was not satisfied with the information it had obtained and was not ready to move forward. Federici testified that he

"basically" told the Respondent that the Union was still interested in moving the SAS pilot forward and that he offered to make himself "available to meet . . . to produce rank and file shop stewards that could look at whatever model we were looking at." Miles, on the other hand, testified that Federici cast his inquiry about SAS as one he was making at McNutt's behest. According to Miles, she responded: "You know what we're doing. You know, we talked about this with you. You guys don't want that." According to Miles that ended the discussion of SAS during the Charleston meeting.

Based on the demeanor and testimony of the witnesses, and the record as a whole, I found Miles' account of the Charleston discussion more credible than Federici's. Miles testified about the conversation in a clear and certain manner, her account was not called into question during cross examination, and other evidence was not inconsistent with that account. On the other hand, Federici's testimony was on its face somewhat uncertain – he couched his account as being "basically" how he responded -- and his demeanor reinforced my impression that he was not certain. Moreover, the reliability of Federici's account is cast into doubt by the fact that Federici testified that on five or six occasions,[4] starting with the March 2011 Boars Head meeting and ending with a January 2012 telephone conversation, Miles used essentially the same language to deflect his inquiries about SAS. In each instance, according to Federici, Miles stated that the Respondent was not satisfied with the information it had and was not prepared to move forward with the SAS pilot. Under the circumstances present here, this repetition suggests to me either that Federici's memory regarding the specifics of these conversations was extremely hazy, or that he was somewhat uncreatively fabricating this aspect of his account. In addition, I view Federici's actions after the discussion in Charleston as hard to reconcile with his account of that discussion. Federici has been an official of the Union for over 20 years and during the time in question he was its second highest ranking officer. The record does not provide a reasonable explanation for why such a union official, even one committed to a cooperative and careful approach, would allow management to so easily and unhelpfully sweep aside one inquiry after another regarding a program that the official was committed to instituting without unnecessary delay. I would expect some active response by Federici and/or the Union in the immediate aftermath of the Charleston meeting – a written demand for action by the Respondent within a stated timeframe, an attempt to convene the SAS committee on specific dates, a request for specific information and/or documents relating to SAS, the presentation of a Union proposal for the SAS pilot, a grievance, a ULP filing, *something*. The absence of any action at all undermines the credibility of Federici's account. The non-action of Federici and Dixon is consistent with the Respondent's claim that those officials had consented to delay the development and implementation of the SAS pilot indefinitely or until the Respondent implemented its new electronic scheduling tool.

4. Baltimore Meeting

Federici testified that he and a union official named Lavoris Mikki Harris discussed SAS with Miles again during a face-to-face meeting in Baltimore, Maryland in December

[4] This tally includes the meeting in Charleston, the previously discussed meeting in Charlottesville, two to three telephone conversations about which Federici testified, and a meeting in Baltimore, which is discussed below.

2011. The parties were present for other purposes – a health and welfare trust meeting – but, according to Federici, found time to discuss SAS. Federici says that he asked Miles:

> "[Where] they were at with it? Were they any closer? Did you get any new information? Have you found anything that's gotten us closer to implementing and moving it forward? When are we going to have enough information to convene our committees? When are we going to have enough information to sit down and really look at something.

Federici testified that Miles responded essentially as she had previously – the Respondent did not have any new information and was not ready to move forward. Miles denied this conversation, stating that the meeting in Charleston the previous September was the last time she had a conversation with the Union regarding SAS before she was transferred within Kroger and ceased to be involved with the SAS pilot.

For essentially the same reasons that I declined to credit Federici regarding disputed aspects of the Charleston meeting, I do not credit his testimony regarding the meeting in Baltimore. Once again, Federici claims that Miles responded to his inquiries about SAS in almost exactly the same, unenlightening, way that she had to every previous inquiry and yet he took no steps during the following weeks and months to encourage the Respondent to take action. Although Federici stated that another union official, Harris, was a witness to the conversation, that individual was not called to testify, nor was Harris' absence explained.

5. Cincinnati Meeting

On March 1, 2012, during a meeting in Cincinnati, Ohio, at the Cincinnatian Hotel, the parties had their last face-to-face discussions regarding the SAS pilot prior to the Union's filing of the charge underlying this proceeding. Present for the Respondent at the March 1 meeting were Anderson and two individuals – Steven Loeffler and Michael Christle – who had not participated in the discussions described above. Loeffler is the Respondent's senior director of labor relations and he had been the lead negotiator for the Respondent during the 2010 negotiations for the Richmond/Tidewater contract. Christle is a labor relations manager who assumed some or all of Miles' duties when Miles moved to a new position with Kroger. Present for the Union were Federici, Sauter, and a union official named Chuck Miller. The parties were in Cincinnati for a trust fund meeting, but had agreed to have sidebar discussions regarding a number of other subjects. A February 28 memorandum from Loeffler to McNutt identified 15 general subjects for discussion. One of those subjects concerned the Union's failure to return an executed copy of the 2010 collective bargaining agreement to the Respondent. Apparently, the Respondent's understanding was that McNutt was refusing to do this in part because of the delay in implementation of the SAS pilot. Regarding that delay, Loeffler stated the following in the February 28 memorandum to McNutt:

> As for the pilot, the system that both parties were relying on to help accomplish the pilot has been delayed for improvements and is not scheduled for implementation enterprise-wide for the next several years. Mid-Atlantic is expected to go live with the new

> scheduler programming in 2013. If you want some sort of simulation pilot done to get an idea of how it might work we can certainly do that, but the reality is that the new system is designed to accomplish a lot of your interests and will be in place by the time we could do a manual iteration of a "pilot." Will it totally maximize schedules? No, but that was never out intent. It my have been *your* intent, but if you have an expectation that full-time jobs are going to replace part-time ones, such is not occurring anywhere in our industry. What I heard your interest to be was to maximize the schedules to the degree they could be and that you wanted to improve the situation to the degree the business could accommodate.

In the memorandum to McNutt, Loeffler did not suggest that the Union had previously agreed to postpone the SAS pilot indefinitely or until ELSS was implemented. Loeffler testified that he did not reference Federici's consent to such a delay because the Respondent believed that Federici and McNutt (Federici's superior in the Union hierarchy) were not in agreement regarding the delay and the Respondent did not want to cause Federici trouble with his boss.

On March 1, Federici began the discussion regarding SAS by asking the Respondent's officials what the "circumstance" was regarding the SAS pilot and "were we any closer." Loeffler responded that there was going to be a national program – ELSS – that Loeffler believed would meet the objectives that the Union had hoped to address through SAS. Loeffler had no materials to give the Union at that time regarding ELSS. Federici asked when the national scheduling tool was going to be implemented and Loeffler responded that it was slated to be put in place at the Richmond/Tidewater locations in July 2013. Federici asked whether the implementation timetable for Richmond/Tidewater and/or the entire mid-Atlantic division could be accelerated. The Respondent's officials agreed to make a phone call to check whether this was possible, and a short time later the Respondent informed Federici that the Respondent could not agree to accelerate implementation of ELSS.[5]

Loeffler testified that during a private conversation in Cincinnati he told Federici that Anderson was "livid" about the fact that "you've brought up this Select-A-Sked again" and was "disgusted with the fact that you and Terry [Dixon] have been kicking the can down the road, and now, you're raising the issue . . . a year after some discussions [during which] you made it clear that you had no interest in Select-A-Sked." Loeffler also told Federici "we can't keep you off of Front Street with your boss" – a reference, Loeffler says, to the Respondent's view that Federici and McNutt "were on different pages" with respect to SAS. Federici did not testify about this private conversation and based on the absence of contrary testimony, and on Loeffler's demeanor and the record as a whole, I credit Loeffler's account of the conversation.

[5] The accounts of the Respondent's officials regarding the phone call are so divergent that I do not credit either and, in fact, reach no determination as to whether the Respondent actually made the phone call. Anderson testified that he had Christle call to check on whether ELSS could be accelerated for the mid-Atlantic division and that Christle informed the Union that the Respondent could not agree to accelerate. However, Christle testified that he did not make such a phone call or communicate the results of a phone call to the Union. According to Christle, it was Anderson who contacted the general office to ask about the possibility of accelerating the ELSS implementation and Anderson who told Federici that the Respondent could not agree to accelerate.

Witnesses for the two sides do dispute how Federici initially reacted when, at the Cincinnati meeting, Loeffler explained that ELSS would not be implemented until July 2013. According to Federici, he reacted angrily, telling the Respondent that "after all the meetings and patience and then to be told that they have a program they're going to implement that will address everything but it won't be for another year and some months" was "a bunch of bullshit." According to Federici, it was after making this statement that he asked the Respondent whether implementation of ELSS could be accelerated. Loeffler, on the other hand, denied that Federici ever became upset, or used the word "bullshit" during the Cincinnati discussion. Similarly, Christle testified that Sauter was "pleased" by their discussions.

After considering the above evidence, I credit Federici's testimony that he reacted angrily when Loeffler told him that ELSS would not be implemented until July 2013. I base this largely on Federici's testimony which was quite clear, specific, and confident on this point. Moreover, Federici's testimony about his reaction is buttressed by Loeffler's testimony indicating that Anderson was "livid" and "disgusted" that Federici had brought up the SAS pilot. As discussed above, the Respondent itself had made the SAS pilot part of the agenda for the meeting. I cannot see why Anderson would be livid and disgusted if, as Loeffler claims, all Federici had done was ask about the SAS issue and then acquiesced in a delay as long as the Respondent looked into accelerating the implementation of ELSS. Anderson's extreme reaction makes sense if one assumes that Federici, after previously consenting to an indefinite delay, suddenly became angry about the delay. However, Anderson's reaction is hard to square with the amicable picture that Loeffler attempts to paint of the parties' discussion in Cincinnati.

I did not find Christle to be a credible witness regarding disputed aspects of the Cincinnati meeting. Based on my consideration of his demeanor, testimony, and the record as a whole, I believe that Christle was straining to support the Respondent's claim that the Union had calmly acquiesced when notified that the Respondent wanted to delay until at least July 2013. Christle began by stating that he "recall[ed] Sauter mentioning" that he was "pleased" with this discussion. When pressed, however, Christle admitted that he did not actually remember Sauter using the word "pleased" and could not remember what, if anything, Sauter said to give the impression that he was pleased. Eventually, Christle backpedaled from his assertion that Sauter *said* he was pleased, and testified that Sauter "*seemed* pleased".[6]

[6] There was also conflicting testimony on the question of whether, prior to the Cincinnati meeting, the Respondent had notified Federici that management was preparing to implement another scheduling system. Federici testified that the Respondent provided that information to him for the first time at the Cincinnati meeting, but Miles and Anderson testified that they had discussed it with Federici a year earlier at the March 2011 meeting in Charlottesville. For the reasons set forth in the earlier discussion of the Charlottesville meeting, I do not credit one side over the other regarding this disputed question. The evidence did, however, show that during a meeting in Roanoke, Virginia, in March or April of 2011, the Respondent told Dixon – who was assisting Federici regarding the SAS pilot – that management was considering the implementation of a new scheduling system.

6. Tysons Corner Meeting; Charge Filing; Conversation between Christle and Dixon

The Respondent and the Union were scheduled to have a trust fund meeting at a hotel in Tysons Corner, Virginia, starting on Monday, April 23, 2012. In advance of that meeting, Loeffler communicated with McNutt about using the occasion to discuss outstanding issues unrelated to the trust fund. In an April 17 email, Loeffler advised McNutt that he would be arriving at the hotel in Tysons Corner at 5 pm on Monday, April 23, was willing to "dedicate as much time together as possible to get at our issues," and that, after the meeting, he was "willing to travel to wherever is convenient for [McNutt] to have subsequent conversations" and was "wide open the entire week of April 29" for such conversations. On April 18, in an email to McNutt, Loeffler wrote, inter alia, "See you and your guys Monday." That same day, McNutt wrote back. "Keep me posted if any flight delays," and Loeffler responded "Np" – meaning "no problem."

On April 19, 2012 – the day after the email exchange described immediately above, but before the Tysons Corner meeting actually began – the Union, by its General Counsel, Jeffrey Daniel Lewis, filed the initial charge in this case. The charge stated, inter alia, that the Respondent had "failed and/or refused to implement 'super scheduling' . . . which Kroger and UFCW, Local 400 agreed to during negotiations for the current collective bargaining agreement." It does not appear that the Respondent received notice of this charge in advance of the start of the April 23 start of the Tysons Corner meeting because the notice was mailed to the Respondent on April 23.

On April 22, Loeffler sent McNutt an email listing 13 general topics that could be discussed during breaks in the trust fund proceedings. The SAS pilot was not expressly mentioned as one of those topics; however, the list did include "execution of Richmond Tidewater CBA," a topic that the previous, February 28, memorandum from Loeffler had defined as encompassing the SAS pilot. Loeffler's April 22 email also told McNutt "We will plan to see you and your folks about 5pm at the hotel."

On April 23, Loeffler and Anderson waited in the hotel lobby to meet McNutt. In a 4:53pm email, Loeffler notified McNutt that "We are in the lobby bar." Loeffler and Anderson waited in the hotel lobby for approximately 90 to 105 minutes, but McNutt did not appear and did not notify the Respondent that he was not coming. Loeffler and Anderson did see Federici in the lobby and asked him what was happening regarding the meeting with McNutt. Federici stated that he could not "take responsibility" for McNutt, but that McNutt was supposed to be there. Federici, Loeffler, and Anderson did not engage in bargaining that evening regarding the SAS pilot, nor did any of those individuals attempt to do so in McNutt's absence. Loeffler, Anderson, and McNutt were all present at the trust fund meeting the next day; however, none of them attempted to bargain about, or discuss, the SAS pilot. Nor did they discuss McNutt's failure to attend the scheduled meeting in the hotel lobby the prior evening.

After the Respondent received notice of the Union's April 19 unfair labor practices charge, Christle spoke by telephone with Dixon, the Union official who had been assisting Federici regarding SAS. Christle testified that Dixon said that he did not understand why the charge had been filed because the Union was satisfied with the scheduling system that was

already in place and was not interested in pursuing SAS. According to Christle, both he and Dixon were confused by the fact that the Union had filed the charge and a grievance on the same subject and Dixon described the Union's action as "ridiculous." Dixon was not called as a witness. I credit Christle's testimony regarding this phone conversation, since that testimony was given in a clear manner, was not facially implausible, and was neither contradicted by other credible evidence nor inconsistent with the record as a whole.

7. Respondent Did Not Refuse to Meet

The uncontested evidence shows that from the time of the March meeting in Cincinnati, the Union never made a demand for further bargaining regarding the SAS pilot, nor did it make an information request. Loeffler, Anderson, Miles and Christle all testified that they never told the Union that the Respondent was unwilling to meet or bargain regarding the SAS pilot. Their testimony on this point was uncontradicted and I credit it.

C. Complaint Allegations

The Complaint, as amended, alleges that since on or about March 1, 2012, the Union has requested that the Respondent bargain collectively over the development and implementation of a scheduling program pursuant to a letter of understanding between the Respondent and the Union, and the Respondent has refused to do so in violation of Section 8(a)(5) and (1) of the Act.[7]

III. Analysis and Discussion

It is a violation of Section 8(a)(5) of the Act for an employer to refuse to bargain collectively with the designated collective bargaining representative of its employees. 29 U.S.C. Section 158(a)(5). The bargaining obligation applies to terms and conditions of employment about which the employees' collective bargaining representative seeks to negotiate. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The scheduling of shifts is a term and condition of employment and a mandatory subject of collective bargaining. *Rose Fence, Inc.*, 359 NLRB 1, 5 (2012). Both the Respondent and the Union, therefore, had a duty to enter into discussions of the SAS pilot with the sincere purpose of finding agreement. *ServiceNet, Inc*., 340 NLRB 1245, 1253 (2003); *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

I note at the outset that although the parties introduced evidence regarding meetings and other events occurring in 2010 and 2011, the complaint allegation is *only* that the Respondent refused to bargain regarding the SAS pilot *since on or about March 1, 2012*. There is no complaint allegation that the Respondent engaged in a course of bad faith bargaining that began in 2010 or 2011. After carefully reviewing the record, I find no evidence that the Respondent

[7] The Complaint as originally filed alleged that the request to bargain, and the Respondent's refusal to do so, dated from "on or about April 15, 2012." At the start of the hearing, I granted the General Counsel's motion to amend the complaint to allege that the Union's request to bargain dated from on or about March 1, 2012.

took any action since on or about March 1, 2012, that can reasonably be construed as a failure or refusal to bargain regarding the SAS pilot. To the contrary, in the written agenda that Loeffler sent to Union in preparation for the March 1 meeting in Cincinnati, the Respondent suggested that the parties could do a "simulation pilot." At the March 1 meeting, Loeffler raised the possibility that the Union would find that ELSS alleviated the need for the SAS pilot. After the March 1 meeting, the Respondent scheduled an April 23 meeting with McNutt to discuss a number of subjects, including the SAS pilot, but neither McNutt, nor any other Union official, showed up for the meeting. The Respondent did not make a demand for further bargaining regarding the SAS pilot and it is uncontested that Loeffler, Anderson, Miles and Christle never told the Union that they were unwilling to meet or bargain further regarding the SAS pilot. Indeed, the Union filed the charge on April 19 even though the Respondent had been communicating with McNutt since April 17 in an effort to schedule face-to-face bargaining on April 23.

The best that the General Counsel can manage as far as identifying a failure to bargain since on or about March 1, 2012, is to contend that the Respondent refused to bargain regarding SAS when, at the Cincinnati meeting, Loeffler responded to Federici's questions about the SAS pilot by "informing him of its own scheduling system [ELSS], which it would roll out in 2013, without even a pilot." Brief of General Counsel at Page 25. I reject the notion that the Respondent's announcement regarding ELSS constituted a refusal to bargain about the SAS pilot. The record indicates that ELSS was an electronic scheduling tool that was flexible enough to accommodate a wide range of variables, including an SAS pilot. Although it appears that Loeffler hoped the Union could be made to see ELSS as a substitute that would alleviate the need for the SAS pilot, the evidence does not show that the Respondent's plans for ELSS, or Loeffler's statements regarding ELSS, foreclosed good faith bargaining regarding the development and implementation of an SAS pilot or precluded the Union from rejecting Loeffler's suggestion that ELSS might alleviate the need for SAS. I note, moreover, that while the General Counsel is critical of Loeffler's announcement regarding ELSS, the complaint does not allege that the Respondent unlawfully failed to bargain regarding ELSS.

Although as stated above, the complaint only alleges a violation since about March 1, 2012, the General Counsel attempts to demonstrate that the Respondent acted in bad faith regarding the SAS pilot prior to that time. The General Counsel seems to hope that this evidence will show that Loeffler's facially benign statements at the March 1 meeting were the culmination of a plan to avoid bargaining regarding SAS. Assuming that the Respondent's bargaining behavior in 2010 and 2011 is worthy of significant consideration despite not being alleged in the complaint, I conclude that consideration of that behavior does nothing to advance the General Counsel's case. To the contrary, the facts discussed above show that during the period prior to March 1, 2012, the Union officials who were responsible for the SAS issue had consented to delay the development and implementation of the SAS indefinitely or until the Respondent implemented the nationwide electronic scheduling tool. The evidence shows that Dixon, during the March/April 2011 meeting in Roanoke, told the Respondent that he was in favor of such a delay. At that meeting, the Respondent's official stated that it might not be worth it to develop a new SAS pilot, "when there was something coming down the pike that could either potentially replace it or could be modified as . . . something similar to [SAS]." In response, Dixon indicated that he did not think it was necessary to move forward with the SAS pilot because the employees were satisfied with the existing scheduling system and were not

interested in SAS. About 5 months later, during the September meeting in Charleston, Miles told Federici that her understanding was that the Union did not want the SAS pilot. Federici did not continue the conversation or otherwise contradict Miles' understanding.

The fact that prior to March 1, 2012, the Union did not attempt to force the SAS process along by demanding specific action, proposing dates for the SAS committee to meet, proposing its own SAS system, requesting specific relevant information, or filing a grievance or an unfair labor practices charge, leads me to view the delays regarding SAS as the result of a lack of enthusiasm on both sides, not the bad faith of the Respondent. During the period starting when the letter of understanding was adopted in August 2010, the Union never demanded that the Respondent do anything more or different with respect to bargaining over the SAS pilot. The statements and non-action of Federici and Dixon created a situation in which the Respondent's willingness to bargain in good faith regarding the SAS pilot prior to March 1, 2012, was not tested, and therefore cannot be found lacking. Cf. *Chicago Tribune Co*., 304 NLRB 259, 260 (1991) (in evaluating the sufficiency of a respondent's bargaining efforts, the Board has considered whether the union's bargaining behavior has created a situation in which the respondent's good faith could not be tested and, therefore, could not be found lacking); *Continental Nut Co.*, 195 NLRB 841, 858 (1972) (same).

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain since on or about March 1, 2012, should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The evidence does not show that the Respondent committed the violation alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 4, 2012.

PAUL BOGAS
Administrative Law Judge

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.